Supreme Court of the United States

OCTOBER TERM, 1948

No. ------

SAM ZIMMERMAN, PETITIONER,

vs.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Note—This "Transcript of Record" is not a complete copy of the official, certified Transcript filed with the Clerk of this Court with the Petition for Certiorari and Brief, but is a consolidation of the appendices to the briefs filed by Petitioner and Respondent in the Court of Appeals of Maryland, together with the Opinion of the Court of Appeals of Maryland, and is filed for the convenience of this Court in considering the Petition for Certiorari herein, Petitioner having requested leave to proceed *in forma pauperis*.

Order granting motion for leave to proceed in forma pauperis; granting petition for certiorari and transferring case to appellate docket 76

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APPENDIX TO APPELLANT'S BRIEF NO. 177.

OPINION OF THE LOWER COURT.

(Tr. pp. 175-189):

Gentlemen, owing to other pressure in this Court I shall deliver an oral opinion now rather than wait and write a formal opinion.

THE MOTION—A motion was filed by counsel for Sam Zimmerman to quash the indictment on the ground that the Grand Jury was not selected in accordance with the laws and requirements of the Charter and Public Local Laws of Baltimore City, and in violation of the rights guaranteed to the accused by the Constitution of the United States and the State of Maryland.

CITATIONS—Here are some of the applicable citations: Carter vs. Texas, 177 U. S. 587; Smith vs. Texas, 311 U. S. 128; Corpus Juris Secundum, Grand Juries, Section 12, page 1003—etc.; 19 Boston University Law Review, 413; 29 Illinois Law Review, 498; 30 Journal of Criminal Law and Criminology, page 264; Lee vs. State, 163 Md. 56; the various Jackson cases—180 Md. 658, 133 Fed. 2d. 476, 47 Fed. supplement, 362, 319 U. S. 746. The Charter and Public Local Laws of Baltimore City, as codified in the 1938 volume, and the Supreme Bench Rules. In these cases just mentioned are cited a host of cases that I am not now especially enumerating as I would if I were filing a formal opinion.

THE LAW—The law is well settled that discrimination against negroes in the selection of Grand Jurors is ground for reversal of the conviction of a negro. Systematic exclusion of negroes from Grand Jury service constitutes unconstitutional discrimination.

Officials charged with the drawing or selection of Grand Jurors are vested with a wide discretion in their selection and in determining their fitness. They must,

however, exercise impartiality in the performance of their duty. The presumption is that these officers have performed their duty, and discrimination must be established by competent evidence. The absence of negroes on a particular grand jury, or the fact that negroes are not placed on grand juries in the proportion that they bear to the white population, does not of itself show discrimination.

Whether race discrimination was practiced is an issue of fact, to be established by testimony with some degree of certainty to overcome the presumption that the officials in the discharge of their duty complied with the law.

Judge Ritchie said, in Cooper versus State. 64 Md., 40 cited with approval in Lee vs State, 163 Md. 56, that "to place colored persons on a jury simply because they are colored men would be a violation of the law as well as to exclude them for that reason."

In the Lee case our Court of Appeals said: "No positive action at all is required as a performance of the duty imposed by the constitution; it requires purely a negative, theabstaining from exclusion of negroes from the competition of qualifications for selection of jurors, and the chance of gaining places on panels. Indeed, any selection of a negro because he is a negro, or any special consideration given to his race, would be a violation of the law for selecting juries."

Our Courts have said that it is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

The local laws relating to the selection of jurors are directory and mandatory, and the rules of the Supreme Bench follow the public local laws.

CONTENTIONS OF THE ACCUSED—The traverser contends that the Supreme Bench in its selection of

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Grand Jurors has named only one negro to the Grand Jury and this has been a deliberate practice following a pattern, and that it is a discriminatory action justifying the quashing of the indictment.

FINDINGS—The general system of selecting jurors in Baltimore City was very well stated by Judge Chesnut in his opinion in the Jackson case and again by Judge Soper for the Circuit Court of Appeals in the same case. True, they were dealing with petit jurors. Judge Chesnut said that in the selection of petit jurors in Baltimore City, "There has been no intentional and systematic exclusion of negroes from juries in Baltimore City; and no discrimination against them in practice on account of race and color in the selection of juries by the Supreme Bench of Baltimore City."

Counsel for the traverser offered to show through former members of the Supreme Bench that up until 1944, perhaps even 1945, "it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one."

And further that "It was the established, recognized, accepted and deliberate practice of the Supreme Bench, accepted as its final selection as the colored member of the Grand Jury, that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench * * *".

If the present selection of members of the Grand Jury followed any such pattern as that claimed by the accused, then the testimony of these former judges would have been admissible. But, if the pattern from 1945 to date is different then the testimony is not admissible.

The accused in this case was indicted by the May Term, 1946 Grand Jury. As a matter of fact, of the 23 Grand Jurors originally selected to the May Term of

1946 Grand Jury by the Supreme Bench and notified to appear by the Sheriff, two were negroes, namely, Willard W. Allen and John L. Berry. Both of these gentlemen asked to be excused from serving.

No effort is made by the Supreme Bench to compel persons to serve on the Grand Jury if they find the duty too burdensome. The reasons are these: Service on the Grand Juries of Baltimore City is for a period of four months. Petit jury service is only for three weeks. Grand Jurors serve every day of the week, except Saturdays and Sundays. They must be present at ten o'clock, and usually the entire morning is taken up by service in the Grand Jury room. In addition they spend a great deal of their time visiting various State institutions and places of public assemblage and do devote much time to their tasks as Grand Jurors.

It is apparent that many persons, particularly professional men, employees, business men who have what we call a "single man business", business men whose time and business require them to be at their place of business or suffer undue hardships, and employees who cannot be replaced for such a long period, and many others are unable to serve because of the sacrifice required.

Therefore these two men, Allen and Berry, along with others named to the Grand Jury from time to time, asked to be excused. They were excused without any further ado. And in their place T. Wallace Lansey, Sr., Negro, and one white person were selected by the Supreme Bench at a special meeting called for that purpose to fill these vacancies.

The Supreme Bench always hold a special meeting after the Judge presiding in Criminal Court Part I notifies the Chief Judge that any persons selected are unable to serve. These special meetings are called promptly and new selections are made.

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We find in the January Term, 1945 Grand Jury two negroes served, namely, Edward Richard Blake and W. Emmett Coleman.

In the September Term, 1945 Grand Jury two Negroes, namely, Edward N. Wilson and Robert James Young served.

As Judge Smith has said, since he was Chief Judge in 1945, we have had seven Grand Juries. There have been eleven Negroes who have been actually selected and named by the Supreme Bench to serve thereon. Two asked to be excused, so actually nine served on the Grand Juries since 1945.

The lists of names submitted by the Judges to the Chief Judge out of which the ultimate nominations were made contained, as testified by Chief Judge Smith, as many as six Negroes.

The record also shows that these men were nominated by different Judges and not by any particular Judge.

The charge that the Grand Jury consists of "One, no more than one, and not less than one" Negro is just not substantiated by the record.

As Judges Soper and Chesnut pointed out in their opinions, the fact that the percentage of negroes serving on Petit juries is not in proportion to population is due to certain factors which must be taken into consideration. Negroes comprise about 19% of the population of Baltimore City. Many, however, are disqualified from serving on juries for various reasons, such as illiteracy, criminal records, or other reasons. The details are set out in both Judge Soper's and Judge Chesnut's opinions and apply to the Grand Jury with the same force as the petit jury.

Mr. Folger, the Jury Clerk, is completely free from any bias. He has exercised neither conscious nor unconscious discrimination against Negroes in the selection of jurors.

I can hardly believe that the former Judges whom counsel offered to have testify would have stated what counsel said in his offer of proof, but if it were so, then I am sure they will be glad to know that the Supreme Bench as presently constituted is selecting Grand Juries differently.

Each member of the Supreme Bench of Baltimore submits to the Chief Judge a list of names of persons deemed qualified to serve on the Grand Jury. No specific number of names is required to be submitted by any one Judge. Some submit more than others. These names are turned over to the jury clerk. Mr. Folger then checks his "Service Files" that is, the record in his office, to determine if these persons have served on juries before and to obtain certain necessary information such as occupation, age, etc. It so happens that practically every name submitted in the list to the Chief Judge for the May Term, 1946 Grand Jury was already in the service file of the jury clerk. This list runs, according to Judge Smith, from 1945 to date, from forty-three to fifty-four names for each Grand Jury. With the additional information furnished by the jury clerk this list is returned to each Judge. Then a Supreme Bench meeting is held. Each Judge usually nominates two persons to serve on the Grand Jury. If any objection is made to a particular individual by any Judge, he is not selected. Sometimes members of the Supreme Bench do not nominate from the lists that they themselves have submitted, but select persons originally nominated by another Judge.

Efforts have been made to secure a large base list from which to name persons for the Grand Jury, particularly negroes. Judge Niles, for example, who served as Chief Officer of the Rationing Boards of Baltimore City, was able to compile a list of colored citizens who voluntarily gave up their time to serve in the war effort. Persons from this list have been named from time to time, and it was Judge Niles who nominated some of them to serve on Grand Juries.

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The Supreme Bench of Baltimore City has sought to avoid both discrimination in the selection of Grand Jurors, and even the appearance of discrimination.

There was a time, as every trial lawyer knows, when the letter "C" indicating "Colored", appeared after the names of Negroes on the printed lists of petit jurors furnished to counsel. In 1945, the Supreme Bench ordered this letter "C" stricken from the printed lists. This was done by the Supreme Bench voluntarily, on its own motion, without suggestion from any individual or group. In the printed petit jury lists there is now no indication of any kind as to whether the juror is white or colored. And in striking a jury, a lawyer does not know from the printed list whether an individual is white or colored.

No list is furnished to the public which shows whether any members of the Grand Jury are white or colored. True, the Supreme Bench itself receives a list of nominations which the individual members of the Bench alone have, containing the name, address, occupation, age, previous jury service, and whether the person is white or colored.

The Supreme Bench of Baltimore is not discriminating against Negroes in the selection of Grand Jurors. Since 1944 the present Bench has contained many new members, more than a majority. Many changes with respect to practice have taken place. For example, as Judge Smith pointed out, the Supreme Bench of Baltimore now meets weekly at a luncheon meeting, and sometimes more frequently. Many problems are discussed, including the entire method of the selection of jurors with the sole idea in mind of bringing about an improvement in our system. As a result of these meetings of the Bench, we have codified and rewritten all of the rules of the Supreme Bench, something that has not been done, I suppose, over many decades. In addition, we have taken an interest in the condition of the Court House so that there is presently to be placed before the public a loan for the reconstruction and modernization of the Court House.

Out of these and other meetings has grown a close, intimate relationship existing within the Supreme Bench as a result of the exchange of views and ideas. Now, we are attempting to broaden the base out of which the whole jury list is made in order to bring in many persons who have not heretofore served. We see no reason why some persons should be called back every two years to serve while others are never called. That is a task which cannot be done in one day. We are working on it and a special committee of Judges is moving toward an increase in the basic lists not only as to any group but as to all citizens of Baltimore who are competent and able to serve, whether it be on a petit or Grand Juries. We have sent to Annapolis our approval to a bill to eliminate the exemption of honorary members of the militia from jury service. We have asked the General Assembly to pass a bill authorizing the Board of Estimates of Baltimore City to increase the pay of jurors. We do not believe $3 a day is adequate but we believe that the Board of Estimates, which has to find the money to pay them, ought to be the group which has to pass on what the amount of their pay should be. We are endeavoring to secure a large and representative list of all persons, white and colored, to serve on our Grand Juries and on our Petit Juries, and all this is being done without regard to this particular case.

The Grand Jury of May, 1946, which indicted Zimmerman, was fairly and properly chosen in accordance with the law. No discrimination against Negroes in the naming of that Grand Jury, nor has there been any discrimination of any kind since I have been on the Bench. The evidence in the case dates from Judge Smith's first Grand Jury as Chief Judge, that is, since 1945. There has been no discrimination of any kind since that date. I am not dealing here with any charge that anybody may make as to Grand Juries selected prior to that time.

The evidence here shows no discrimination. The facts are clear, and, I think, demonstrate not that there was

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no Grand Jury in a long time that had more than one Negro, but on the contrary that in the past two years and a few months there have been three Grand Juries where two Negroes actually were named. The Supreme Bench is not responsible for the fact that the very Grand Jury that indicted Zimmerman had two persons named who were colored but who for personal reasons requested that they be excused from serving.

I have decided, as I have said, to give this oral statement now, based on my notes rather than to wait to write a formal opinion.

The motion to quash the indictment is overruled.

* * * * * *

RULING APPEALED FROM.

(Tr. pp. 1, 189):

Mar. 27, 1947—Motion to Quash Indictment Overruled. Sherbow, J.

DIRECT EXAMINATION OF

EDWARD R. FOLGER, Jury Clerk of the

Supreme Bench of Baltimore City.

* * * * * *

(Tr. pp. 20-21):

(Mr. Boyd) I asked for him to bring his records for that Grand Jury.

(The Court) That is May, 1946.

Q. Have you brought your records for the Grand Jury of that term? A. Yes.

Q. You received prior to the beginning of the May term a list from the Chief Judge consisting of fifty names? A. Yes.

Q. Do I also understand that you, as Jury clerk, select a list of some seven hundred and fifty names from time to time for use in the selection of Juries? A. Petit Juries. In the beginning of each term, it is fifty names that have been nominated for the Grand Jury which makes a total of seven hundred and fifty names.

Q. You select only seven hundred names? A. Yes.

Q. And then the fifty names supplied you are, by you, added to the previous seven hundred and fifty? A. To the seven hundred names, making seven hundred and fifty.

* * * * * *

(Tr. p. 22):

Q. Are the names, the fifty list that Judge Smith sends you, taken out of the service files? A. They are not taken out of the service files. The names are written up, we make a notation on a card and put it in our files.

* * * * * *

(Tr. p. 26):

Q. Had you presented your Jury book to the Jury Judge or the Supreme Bench Judges who got that list of fifty names? A. Yes, they get a copy of it.

Q. Had you done it before you got the list of fifty names? A. No, the Chief Judge presents me with a list that gives me the work to interrogate the prospective Jurors who they nominate.

* * * * * *

(Tr. pp. 32-33):

Q. How many substitutions had to be made to the original twenty-three name list for the May Grand Jury, 1946? A. Three of them.

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Q. Were those substitutions made from the typewritten list given you by Judge Smith or from some other list? A. That was from the original list.

Q. In connection with other term Grand Juries, when there must be substitutions, or vacancies filled, where do those names come, from the list supplied by the Chief Judge or from the list you had assembled? A. From the list supplied by the Chief Judge.

Q. That is the invariable custom? A. Yes.

Q. So Grand Juries are composed only of names appearing on the fifty name list supplied you each term by the Chief Judge? A. Yes.

* * * * * *

(Tr. p. 39):

Q. Perhaps you know anyhow. Isn't it a fact that there is but one member of the colored race on any Grand Jury? A. At one time we had two. That was the year before last.

* * * * * *

(Tr. pp. 39-40):

Q. Do you know of any other time? A. No.

Q. Do you know of any other time in the history of the selection of the Grand Jury of Baltimore City when there has been more than one member of the colored race? A. One.

Q. One other time besides— A. No, I say only one time.

Q. Would it be correct to say that every year, since there are three terms of Court, there were sixty-nine members of the Grand Jury, of which sixty-six are of the white race, and three, with the one exception you have mentioned, are of the colored race? A. That is right.

Q. That goes back as far as your records? A. Since 1910. That was when the Jury system was put in by Judge Stockbridge.

Q. The number of names, colored names, appearing on the Grand Jury list is not always six, is it? A. More or less, yes.

Q. It does not stay fixed at six? A. No, sometimes it will be four, sometimes six, possibly eight.

Q. But no matter how many names are on the list, with the one exception, there has not been more than one a member of the Grand Jury? A. That is right.

* * * * * *

(Tr. pp. 43-44):

Q. When you investigate a list of prospective Grand Jurors, do you then ascertain that they are or are not of the colored race? Do you actually find out if they are or are not? A. I can tell by the residence, where they live, as a rule. A lot of these names are checked in our files. We have a large file. If we can't find it there, we check the Criminal Court and the Supervisors of Elections and find out his color.

Q. Do you ever go to where he lives? A. I don't, because I know pretty nearly every street in Baltimore City so far as colored section is concerned.

Q. If you had a man who lived at 1700 Madison Avenue in Baltimore city, would that lead you to believe he was colored? A. He lived in a colored section.

Q. I might agree, but would you then conclude that he was colored? A. Because we take the nominations, and the name which has been submitted is marked "C" and we know then he is colored.

Q. It is marked "C" when it is submitted to you? A. Yes, you will find that on that list (indicating).

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DIRECT EXAMINATION OF CHIEF JUDGE W. CONWELL SMITH.

(Tr. pp. 47-58):

By Mr. Boyd:

Q. Judge Smith, I don't believe that the stenographer needs to have a formal introduction, but I want to thank you for making yourself available in answer to my letter. My motion, as you probably know, if you haven't read it, has particularly to do with the selection of the Grand Jury of Baltimore City. That is a matter which takes place beyond an iron curtain so far as counsel are concerned. I am wondering if you will be kind enough to tell us for the record just how the Grand Juries for Baltimore City are selected ultimately and particularly with reference to the selection of a member of the negro race. We have reference to the May term, 1946, but I don't know that the method differs in any term from another. A. The method of selecting a Grand Jury has been the same ever since I have been a member of the Bench. I came on the Bench in 1938. A list of persons eligible for service on Grand or Petit Juries is prepared in the office of the Jury Clerk, starting with the list of persons assessed for taxes and augmented by names of persons taken from registered holders of telephones, owners of automobiles, and registered voters. The list is augmented and each term, in advance of the term, a list of seven hundred and fifty names is drawn from the wheel, under the superintendence of a member of the Bench who is designated for that year as the Jury Judge. That list of names is prepared and certified and each term it is augmented by suggestions by the various Judges, who recommend certain other persons who may or may not be already included in the list from their own personal knowledge as qualified to serve on the Jury. Those suggestions are made by the various Judges to the Chief Judge. By him in turn, referred to the Jury Clerk. The Clerk makes a report on them and those

names are added to the list and in advance of the term, the Judges meet, and from that list as augmented by the suggestions from the various Judges, the Grand Jury is selected. Now with particular reference to the colored men serving on the Jury, the list of names drawn under the supervision of the Jury Judge invariably includes a number of colored men, I would say at least one hundred or more. The suggestions made by the various Judges from their own personal acquaintances includes additional colored men. The Grand Jury is drawn by the unanimous action of all the Judges on the Bench and has been so drawn ever since I have been a member of the Bench. And ever since I have been a member of the Bench, the Grand Jury has always included colored men, one or two. I remember Grand Juries on which there have been two colored men. I don't remember any on which there has been no colored men. Does that answer your question?

Q. Well, sir, it serves me with a beginning if I may ask a few further questions. With reference to what you said a minute ago about Grand Juries including one or two, Mr. Folger, I think it is fair to you to say, testified that his records showed only one instance, not giving the year, when the Grand Jury had more than one member of the colored race, and at that time it was two members of the colored race. All other times since 1910, he told us, there has been only one member of the colored race. A. I am sorry my memory does not go back as far as 1910.

Q. His does not either. He was speaking from records. I did not want to be in the position of appearing to contradict you. I wanted you to get the benefit of Mr. Folger's testimony. Is it a fact that members of the Grand Jury are selected only from a special list of names, supplied the Jury Clerk through you? A. It positively is not.

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Q. Are we to understand that the Grand Jury is made up by selections from a list supplied the Clerk by you plus names on the large list drawn from the wheel? A. You have the cart before the horse. They are selected from a list of names drawn from the wheel augmented by a list of suggestions made by the various Judges.

Q. Do I understand it to be your position that the Grand Jury does consist of names coming from the let's say the larger list in addition to names which appear only on the special Grand Jury list? A. It is not a question of it's being my position. I am stating what is the fact.

Q. May I correct my question? Do I understand that to be the fact? A. That is the fact. It is the first time in my experience that anyone has had the temerity to suggest that there is any discrimination of colored men in the selection of the Grand Jury.

Q. I assume if you are familiar with the opinion of the Circuit Court of Appeals, Judge Chesnut, in the case of the United States Ex Rel. Jackson against Brady—it was in that opinion that I found the suggestion that while there could be no finding that there was any discrimination as to Petit Juries, the Court very clearly indicated that there was a possibility of discrimination as to Grand Juries. And since I have been appointed by a Judge of this Court to defend a man whose life is in jeopardy by reason of the crime with which he is charged, I feel it not only my duty but otherwise authorized to raise every possible point in his defense and I feel that no Judge of the Supreme Bench would in any way be personally affronted thereby, but that their sense of justice and fairness would require that anything of that nature be aired to the fullest extent.

(The Court) You may proceed, Mr. Boyd.

Q. Could you tell us, please, whether or not any reason exists known to you, or any practice exists known to you, where the Grand Jury for the City of Baltimore

with one exception, out of a period of nine years to your knowledge, would have one member of the colored race and only one member of it? A. I don't know of any reason except to say that the members of the Grand Jury are chosen with regard to their qualifications. And I regard it as a pure coincidence that the number of colored men on the Jury has most usually been restricted to one member. It is certainly not the result of any deliberate plan to limit the number to one or two, or any other number.

Q. Would you care, would it be permissible for me to ask you to tell the Judge probably what he already knows but to get it into the record, the method by which the nominations or the preparation of a list for Grand Jury members takes place? A. Well, I can't answer that question without a certain amount of repetition. First, a number of Jurors are selected from the eligible list by the Jury Judge in the office of the Jury Clerk. The names are placed in the wheel and from the wheel are drawn the regular number, usually seven hundred and fifty. That list is added to by suggestions made to the Chief Judge by the various Judges of persons known to them to be eligible to serve on Grand or Petit Juries. Every Judge may make suggestions of anywhere from two to fifteen names. The combination of all those suggested names is referred to the Jury Clerk. He investigates them, reports their age, occupation, home address, whether they have served on Juries before, if so where, and other like information. After the information is supplied, the names are added to the list and drawn from the wheel. From that combined list so augmented, the Judges at a meeting prior to the beginning of each term select Grand Juries. We do not designate the colored men on the list by any distinguishing mark any more, and I could not say, because I have never stopped to inquire, how many colored men are embraced in the list, but I am sure it is a substantial number.

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(The Court) On the list as typewritten in Mr. Folger's office and sent out, "C" appears after certain names. The final list of twenty-three, does that have any "C" on it?

(The Witness) I don't think so.

(The Court) I know the answer. When the final twenty-three are published, there is no designation indicating that the person is of the negro race.

(The Witness) I don't believe so, no.

(Mr. Boyd) I believe there used to be a custom to that effect.

(The Court) For several years there has been no designation of negro or the letter "C" after Petit or Grand Juries in any Court in this Court House at all. If you were picking a Petit Jury, you would have only the list of the names of the people and if you wanted to find out anything more than their address and occupation, you would have to resort to your own methods of obtaining that information. There is nothing to indicate that the person is white or colored.

Q. That is true. I understand though that the list, part of the list with respect to the May, 1946 Grand Jury, did contain a designation of six colored names thereon, indicating they were colored. A. You mean the list suggested by the Judges?

Q. Yes. At the time of the selection of the Grand Jury, may I ask, is it the practice of the Supreme Bench to take the complete list supplied or submitted to the Supreme Bench by the Jury Clerk which for instance in the May term—I have the original—was it in that form? Do I understand that the Supreme Bench in selecting the Grand Jury took that complete list and perused it and from that complete list selected the May, 1946 Grand Jury? A. Mr. Boyd, it is hardly possible for me to answer about perusing it. Every Judge does

his own perusing. But the list, similar to this list which I have in my hand (indicating) was in the room on the table at the meeting and it was from that list that the selections were made.

(The Court) Let me help you. I think Judge Smith knows the answer. So do I. I know you only want the record to show. Let's go back. Seven hundred and fifty names were taken from a very large list in Mr. Folger's office.

(The Witness) That is right.

(The Court) Judge Smith, do you have any idea how many names Mr. Folger has on list in the Jury Clerk's office?

(The Witness) How many thousands? I have no idea.

(The Court) It goes up into a great big number?

(The Witness) It does.

(Mr. Boyd) It has been suggested in an earlier proceeding that it is twenty thousand.

(The Court) The seven hundred and fifty are selected. They are typed into a black book called the Supreme Bench of Baltimore City Jury book. I am holding it up (indicating). Is that it, Judge Smith?

(The Witness) That is right.

(The Court) To that list of seven hundred and fifty are added names submitted by various Judges?

(The Witness) That is right.

(The Court) Then those names are typewritten up with certain information and what happens to that list with respect to its place physically in the Supreme Bench room?

(The Witness) It is in the meeting on the table before the Judges and from that list the selections for the Grand Jury are made.

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(The Court) Prior thereto, the Judges sign and certify the list?

A. That is right.

(The Court) When they do, the list is there before them?

(The Witness) That is right. After that the list is placed in the hands of the Clerk of the Superior Court.

(The Court) When we are through. At the time of the selection the seven hundred and fifty list, plus the added names, are on the table before the Judges?

(The Witness) That is right.

(The Court) Speaking only from your own observation, is it or not a fact that some Judges do look through that list?

(The Witness) Yes, some of them do. It is true also that some of them refer to their own files in making selections for the Grand Jury.

(The Court) Each Judge acts for himself with respect to what extent he goes through that list?

(The Witness) That is right, but the selection is made by all the Judges together.

• • • • • •

(Tr. pp. 64-65):

(The Court) Judge Smith, may I refresh your recollection and ask you if it is not a fact that there was a vacancy of one individual and that I asked you, or rather that you and I attempted to reach a colored person just recently?

(The Witness) Yes, I remember such an instance but we were unable to reach him as I recall it.

(The Court) Mr. Boyd, I am sure you will accept my statement that that is so. There was more than one vacancy. As we went down the list, there was one name

that I wanted to reach. We could not even get the person by telephone. Judge Smith tried while we were in the Bench room to get him at one place. When he could not, I tried at another. We gave it up because we had to organize the Grand Jury the next day. That was recently.

(Mr. Boyd) That was subsequent to the May term, 1946?

(The Court) This incident was.

• • • • • •

(Tr. pp. 69-72):

Q. Judge Smith, I hope you won't misunderstand this question but I have been under the impression, rightly or wrongly, that the recommendations most seriously considered or ultimately resulting in the selection of the colored member of the Grand Jury comes from that member of the Bench or the senior member of the Bench who, before his ascendency was a member of the Republican Party, is that true or not? A. No, that is not true. He might think so.

Q. Since it is by the unanimous action, if he voted so, he would have the power of veto the same as any other Judge, but is it not a fact that the member of the Grand Jury of the colored race has originated from the nominations of the Republican member of the Supreme Bench? A. Sometimes it has.

Q. That is not a regular course of events? A. There is no practice in that regard, no.

Q. Judge Smith, do I understand that you—I don't mean this in any way but with the utmost respect—your explanation of the fact that since 1938 there have been but three members of the Grand Jury, with one exception, in any year, each of the three Grand Juries in any one year having but one member of the colored race is pure coincidence? A. That is right.

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Q. Judge Smith, to make sure again that I understand correctly, if you will permit me, do I understand that the Grand Jury as ultimately selected, is selected by the Judges by a consideration of and selection from the list, augmented list I think you called it, and also the list selected from the wheel by the Jury Judge? A. It is selected from the augmented list as I have described it. The selection is made with regard to the qualifications of the members of the Grand Jury as citizens and wholly without regard to their race or color.

Q. But perhaps I did not make myself clear. Do you know of any instance where the Grand Jury was selected from anything but the list which you supplied to the Jury Judge, that being the compilation of the recommendations of yourself and the other Judges of the Supreme Bench? A. I positively do. The list is selected —The Grand Jury is selected from the combined list and is not restricted to the list of suggested names received from the Judges.

Q. In that respect I would like to call your attention to the copy of the May term, 1946, document, entitled "Wheel-drawing, Jury Judge W. Conwell Smith" and ask you to look at the fourth page thereof which is designated Grand Jury nominations, May term, 1946. But passing over two pages to look at the next page designated corrected list of nominations for the Grand Jury, May term, 1946. Then pass over again to a subsequent page with number eight for designation "Seven hundred and fifty names for the May drawing, 1946." And I ask you if you would comment on that with respect to my last question? A. It speaks for itself.

Q. The Grand Jury was selected not only from the Grand Jury nominations and corrected list of Grand Jury nominations but also from the names following page eight to which I just referred? A. That is right. You may find in that instance that all of the Jurors eventually selected came from the Judges' nominations or

partly from the Judges' nominations and partly from the general list drawn from the wheel, but my statement still stands that they are selected from the combined list.

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(Tr. pp. 86-87):

RE-DIRECT EXAMINATION OF
EDWARD R. FOLGER, JURY CLERK.

By Mr. Boyd:

Q. How many colored names do you select for the seven hundred and fifty list? A. We generally put in fifty.

Q. When did you start putting in fifty? A. It has been about four years ago. We used to put in twenty-five.

Q. What was the occasion for the change? A. At that time Judge Sayler was the Jury Judge. He thought fifty would be proper.

Q. How do you place those fifty colored names on that list? A. They are put in on the carbon copy of the ballot we use. We used to use "C" on it. Our office received an order from the Bench to eliminate "C".

Q. Then how do you know you are putting twenty-five or fifty colored names on the list? A. For my own individual use, I use a buff card——

Q. Brown? A. For colored.

Q. That indicates he is colored? A. Yes.

Q. For white men you use white cards? A. Yes.

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(Tr. pp. 88-89):

Q. You think that the change from twenty-five to fifty took place about four years ago? A. About.

Q. Was it following the time you testified in the United States District Court? A. It was after I testified.

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Q. Then you upped it to fifty? A. Yes.

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(Tr. p. 90):

Q. You don't put into the Jury wheel the Grand Jury cards? A. No.

Q. Nor do you put into the Jury wheel the cards of the Grand Jury list that are left over after the Grand Jury is selected? A. No.

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(Tr. pp. 103-105):

DIRECT EXAMINATION OF
LAWRENCE R. MOONEY, DEPUTY CLERK
TO THE SUPREME BENCH.

(The Court) No, let's confine it to the selection of the May term Grand Jury, 1946, and then you may enlarge if you want to as to any other term. Take it step by step directed to one. Since it must be one, let it be the one involved in this case.

Q. If you can tell us what you did with respect to the May term Grand and Petit Juries selections as part of your duty please do so. A. Mr. Folger, the Jury Clerk, turns over to me a list of seven hundred and fifty names. In addition to that, he also hands me another list which is—at the top of which is the expression Grand Jury nominations, May term, 1946. Upon receipt of those papers, or those names, I put them in the current Jury Book and afterwards type up what is known as a certification which is signed by the Judges at a future time. That certification indicates that those names were qualified to serve as Grand and Petit Jurors. When the Bench meets, I take the current Jury book along with the certification of the names to the consultation room where the Judges confer.

Q. Does the certification come before you take the book into that room or afterwards? A. I draw it up but

it is not signed. It stays in the consultation room until at a subsequent time the secretary to the Bench sends for me and turns over to me the list of the names. The heading on that list is "Corrected list of nominees for the Grand Jury".

* * * * * *

(Tr. pp. 108-112):

Q. Then during that session or conference of the Supreme Bench, and sometimes during the time it is going on, you are called by the secretary to the Supreme Bench? A. That is right.

Q. That is one of the Judges? A. Yes.

(The Court) Who is it?

(The Witness) Judge Edwin T. Dickerson.

Q. How does that take place, in what form? Does he call you to the door, or do you go in the room? A. He calls me to the door. From the outside he hands me a number of papers. He asks me to draw up the order of the Grand Jury for that particular term.

Q. Do you happen to have with you the sheets of paper which he handed to you in connection with the May term, 1946, Grand Jury? A. I do not have it.

Q. Do you have a copy of it? A. No.

Q. Why is that? A. The list that he hands me is marked in pencil indicating the numbers one to twenty-three. I type those on an order and return the order along with what he had given me, sheets of paper with penciled numbers on them.

Q. Have you any copy at all of the list he handed you on which the numbers have been marked? A. Not in my possession, no.

Q. Do you know what happens to that list from which you take the twenty-three names? A. I do not.

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(The Court) I hate this air of mystery about what is such a simple matter. Judge Dickerson and Chief Judge Smith take the numbers out of a list of fifty or sixty names, together with a list of seven hundred and fifty?

(The Witness) Yes, sir.

(Mr. Boyd) That is not what has been testified to.

Q. Does the secretary give you the list of seven hundred and fifty when he gives you the list with the names of the Grand Jury marked on it? A. No.

(The Court) You get a list containing how many names?

(The Witness) fifty, it could be more or less, sometimes as many as sixty.

(The Court) Out of that list certain numbers are marked. You type them in the order in which they are marked, bring it back to the Supreme Bench room, twenty-three persons having been marked, you type that up?

(Witness) Yes.

(The Court) Is that a list of around fifty names?

(Witness) Yes.

(The Court) Where is the list of seven hundred and fifty names?

(The Witness) In the consultation room.

Q. That list is not handed to you at any time prior to your returning the typed list of twenty-three names to the Supreme Bench? A. That is right.

Q. The typed list you make up is on what form? A. I have it here (indicating) Some is printed. The names I type.

Q. Do you have it for the May, 1946, Jury? A. Yes, here it is (indicating).

Q. You have handed me two papers (indicating). One is dated April 29, 1946, and is printed, partly typed, and partly signed apparently by a large majority of the Judges, ten of the Judges. That is the list which you prepare from the instructions given you by the secretary? A. Yes.

Q. You take this list back in triplicate form? A. I take it back, just the original.

Q. It is then signed? A. Yes.

Q. This paper I hold (indicating) in typing and ink, dated May 8th, 1946, apparently is a correction or substitution of certain names? A. That is right.

Q. From the combined two lists, what do you do? Rather, from the first list what do you do with the first list that is signed? A. I make a copy and send it to the Sheriff's office to have the names summonsed on the date indicated.

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(Tr. pp. 113-114):

Q. What happens to the seven hundred and fifty list? When do you again come into contact with that? A. After the Bench, the session of the Bench is over, I go into the consultation room and get it.

Q. Do you find that it has been signed by the Judges? A. It is signed before the Judges go into formal session on the Bench. They sign that a few minutes before ten o'clock.

Q. How far back do you have records of the Grand and Petit Juries for Baltimore City in your possession as part of your duties? A. The original Grand Jury orders, I can go back a considerable length of time, thirty years possibly. But the records I keep here of the seven

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hundred and fifty names, plus the additional list I have back to 1940.

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(Tr. pp. 114-119):

Q. Have you had occasion to compare the names appearing on the May term, 1946, Grand Jury list, with the list of the nominations for the May term Grand Jury list, or perhaps I should call it the fifty name list? A. I have.

Q. Will you tell us whether or not there are any names on the Grand Jury as selected which did not appear on the fifty name nominations list? A. There were none.

Q. I believe it is a fact that, let's put it this way—strike that out. Were there any names on the finally selected Grand Jury list which also appeared on the seven hundred and fifty list? A. There was one.

Q. Have you also had occasion to check the names appearing on the finally—on the originally selected or finally selected Grand Jury list for years, other than 1946 and including other Juries in 1946? A. I have.

Q. How far back were you able to check that, to 1940? A. Yes.

Q. Will you tell us whether there were on any of the Juries that you were thus able to check, whether there was any occasion when the names on the ultimately selected Grand Jury list or the original list before correction, the Grand Jury list, did not appear on the fifty name nominations list? A. No, in each and every case they did appear.

Q. Was there any other instance but the one to which you refer in the May term, 1946, when a name on the originally or ultimately selected Grand Jury list appeared other than on the nominations fifty name list? A. Yes, there were several other occasions.

Q. They appeared then on both lists? A. Both lists.

Q. But there was no occasion when a name selected for the Grand Jury did not appear on the Grand Jury nominations list? A. That is right.

(Mr. Boyd) I would like to offer in evidence the original record the Grand Jury, May term, the original and corrected selection lists.

(Thereupon the papers referred to were offered in evidence and marked Defendant's Exhibit A 2-24-47 and Defendant's Exhibit B 2-24-47).

Q. How many occasions were there when a name would appear on both the nominations list and the seven hundred and fifty list in the period you examined it? A. Four.

Q. Including the first one you referred to? A. That is right.

Q. Was there ever any occasion when that occurred more than once with respect to any particular Jury? A. Yes, on one occasion twice.

Q. There have been three places when names appeared both on the nominations and the seven hundred and fifty list? A. I should say four.

Q. You said there were two names on one Jury— A. Well, five names if you take it under those circumstances. In the May term, 1940, two names appeared on both lists.

Q. Three other Juries had one name? A. Yes.

Q. Including the May, 1946? A. Yes.

Q. Have you produced the May term nominations list as it was filed in your record? A. I have it here, yes (indicating).

Q. May I see that?

(Thereupon the witness handed it to Mr. Boyd).

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Q. Is this (indicating) original typing? A. As far as I know it is.

Q. How did that get into your possession? A. Mr. Folger turned it over to me.

Q. At what time? A. Prior to the date the Judges signed the certification.

Q. Do you have any Grand Jury nominations list which appears in your 1946 Jury Book? Does this appear anywhere as part of your permanent record? A. That is my permanent record here (indicating).

Q. You keep it in this looseleaf fashion? A. Yes, and eventually bind them and put them in these folders (indicating) for the year.

(The Court) How many are listed for the 1946 list?

(Mr. Boyd) How many names?

(The Court) Yes, they are numbered, aren't they?

(Mr. Boyd) No, this is the clipped copy.

(Mr. Boyd counting). There are fifty names on the list in original typing. This page is headed Grand Jury nominations, May term, 1946. This Grand Jury nominations list I think we had better have marked.

(Thereupon the paper referred to was marked Defendant's Exhibit D 2-24-47).

* * * * * *

(Tr. p. 120):

(Mr. Boyd) For the record, I think we had better mark the seven hundred and fifty list. That list being termed seven hundred and fifty names for the May drawing, 1946. And this list concluding with a certificate to the effect that the Judges of the Supreme Bench certify they have selected the aforegoing seven hundred and fifty names of persons qualified to be Grand and Petit Jurors for Baltimore City, signed by seven Judges.

* * * * * *

(Tr. pp. 130-138):

DIRECT EXAMINATION OF
HONORABLE SAMUEL K. DENNIS.

By Mr. Boyd:

(Mr. Murrell) Your Honor, before Judge Dennis testifies, I want to enter a definite objection to any testimony by Judge Dennis except pertaining to the May, 1946, Grand Jury, and the selection thereof.

(The Court) Mr. Boyd, what is the testimony you want to produce from Judge Dennis.

(Mr. Boyd) The traditional and almost from time immemorial custom engaged in by the Supreme Bench of Baltimore City in the selection of Grand Juries, particularly with reference to the colored members thereof.

(The Court) I will let you go up to the point where your first question deals with the issue and then I will rule. Proceed.

Q. Judge Dennis, you are a former member of the Supreme Bench of Baltimore City? A. I was the Chief Judge of the Supreme Bench for slightly more than sixteen years. I went on in August, 1928 and I resigned effective the latter part of August, 1944.

Q. During that time, did you have occasion to study and consider the method of the selection of the Grand Juries for Baltimore City? A. Unquestionably.

Q. During that time you also served on occasion as the Jury Judge, I believe? A. I would say some, I think three years. I will not be sure.

Q. Judge Dennis, I am particularly interested in obtaining for the Court and the record your testimony generally with respect to the selection of the Grand Jury, but particularly with respect to the question of the members of the Grand Jury of the members of the colored race, and I ask that you tell the Court what that

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custom, practice, system, whatever it might be called, was when you came on the Bench and whether or not during your tenure on the Bench there was any change in that system.

(Mr. Murrell) Objected to, except as to the selection of the May, 1946, Grand Jury.

(The Court) Sustained. In explanation of the Court's sustaining the objection, I again call your attention to the fact that whatever may have been the practice prior to 1946, if that same system obtained in the May, 1946, selection, then of course, you could show a tradition and custom. But if that practice has changed after 1944, 1945, and in 1946 was not the custom that had existed prior thereto, then the testimony of Judge Dennis and the other members of the Bench who have retired, would have no application to this particular case.

(Mr. Boyd) If I can paraphrase the word of Pope, I think it was in the Antiquities but it might be in the Rape of the Lock, he said "It is not fish you are buying but men's lives". I say it is not fish but men's lives. You have in this City under the testimony already in this case, the testimony of the Jury Clerk in whose possession records——

(The Court) Mr. Boyd, if you want to argue the merits of the case I shall be only too glad to hear from you at the conclusion of the testimony in this case.

(Mr. Boyd) You don't care to hear from me at this point?

(The Court) No.

(Mr. Boyd) Under the rules of the Supreme Bench, I shall not attempt to argue it any further.

(The Court) Is there anything else?

(Mr. Boyd) Yes, sir, I shall ask specific questions, unless you direct me not to.

(The Court) Proceed.

Q. Judge Dennis, while you were a member of the Supreme Bench and up until the time you resigned as its Chief Judge, was there a practice or a custom with respect to the number and selection of colored members of the Grand Jury?

(Mr. Murrell) Object to.

(The Court) Sustained.

(Mr. Boyd) The Judge may not even answer yes or no?

(The Court) He may not. You are talking about 1944.

(Mr. Boyd) From 1910 to 1944 under the evidence already in this case.

(The Court) Sustained.

Q. Judge Dennis, is it not a fact that during the time you were on the Supreme Bench and as its Chief Judge, there was the established practice to limit members of the colored race to one member out of twenty-three members of the Grand Jury?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Judge Dennis, is it not a fact that during the time you were on the Bench it was the established practice and custom that the negro member of the Grand Jury was selected and determined by the Supreme Bench based on a nomination or suggestion made almost invariably if not invariably by the or a Republican—by a member of the Supreme Bench who was a Republican before his ascendency to the Supreme Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Judge Dennis, assuming for the purpose of this question that there did exist while you were on the

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Bench and during the whole time you were on the Bench, the practice of limiting the colored race's proportion on the Grand Jury to one member, did you ever suggest or move the Supreme Bench to increase that number or change that number in any way?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I have no further questions.

(The Court) Thank you, Judge Dennis.

(Mr. Murrell) Thank you very much.

(Testimony of witness concluded.)

(Mr. Boyd) Your Honor, I tender to prove, based on the questions that I have already propounded and which have been denied, that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted, and deliberate practice of the Supreme Bench accepting as its final selection as the colored member of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. I also offer to prove substantially those exact facts by former Judge Eugene O'Dunne, serving from 1926 until 1945, and by former Judge Eli Frank, who served from 1922 until 1943. I further offer to prove——

(Judge Frank) Until 1944.

(Mr. Boyd) Excuse me, until 1944. I further offer to prove by Judge Frank that on occasions he suggested that there by a change in the method of selecting the colored members of the Grand Jury, particularly as to

the number, and that that suggestion did not meet any favorable response on the part of the other members of the Bench. I also offer to prove substantially the same facts by Judge Duke Bond, who was a member of the Supreme Bench—I don't remember when you were on.

(Judge Bond) 1922 to 1938.

(Mr. Boyd) 1922 to 1938. I further offer to prove by Judge O'Dunne that on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice.

(Mr. Murrell) Is that your total tender?

(Mr. Boyd) For the time being.

(Mr. Murrell) I object to the tender of testimony on behalf of Judge O'Dunne, Judge Bond and Judge Frank as submitted by Mr. Boyd. I am willing to agree to let them testify if they are qualified as to the selection of the Grand Jury of May, 1946.

(The Court) The tender will not be accepted, Mr. Boyd. The motion, I assume it is a motion, or the objection is sustained, rather.

(Mr. Boyd) There was no objection to my tender with respect to Judge Dennis.

(Mr. Murrell) Judge Dennis took the stand.

(The Court) Does your motion include Judge Dennis?

(Mr. Murrell) Yes, sir.

(The Court) The same ruling. I might say in passing since the Judges are here, that if the testimony showed that a practice which they apparently objected to is no longer in existence it would prove gratifying to them if

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the evidence established that fact. Do you want to call another Judge? I thought you made arrangements to have Judge Sayler here?

* * * * * *

(Tr. pp. 139-143):

DIRECT EXAMINATION OF

JUDGE J. ABNER SAYLER.

By Mr. Boyd:

(The Witness) My name is J. Abner Sayler. I am an associate Judge of the Supreme Bench of Baltimore.

(The Court) From when?

(The Witness) 1937, the month of June. June eighth, I was just told.

Q. Judge Sayler, are you familiar with the selection of Grand Juries by the Supreme Bench of Baltimore City? A. Yes. I have been since 1937.

Q. Judge Sayler, at one time you were the Jury Judge, I believe? A. I have been Jury Judge two years that I can recall.

Q. Judge Sayler, my inquiries are directed to the manner of selection of the Grand Juries, particularly with reference to the participation therein of members of the colored race. I would like to ask you whether or not since you became a member of the Supreme Bench there has been any change in the method of the selection of the Grand Jury or the colored member thereof?

(Mr. Murrell) Objected to.

(The Court) Sustained. Direct attention to the May, 1946, Grand Jury and its manner of selection.

Q. Do you recall the manner of the selection of the May, 1946, Grand Jury? A. I remember it generally, but I don't remember individual members on that Grand Jury.

Q. Judge Sayler, do you know whether or not the May, 1946, Grand Jury was selected in any manner differing in any way from Grand Juries selected prior to that time? A. Frankly, Grand Juries since I have been here, have been selected in one manner and I know of nothing unusual about the selection of that Grand Jury.

Q. Over previous Grand Juries that were selected? A. I know of nothing unusual about it.

(Mr. Boyd) Thank you, that is all.

(The Court) Judge Sayler, throughout this entire hearing a question has been asked and I am asking you specifically now that question to get the answer. Have you taken unto yourself the naming of the colored members of the Grand Juries since May, 1946, to the exclusion of the other members of the Bench in their selections?

(The Witness) No.

(The Court) Judge Sayler, do you know how many colored persons were selected in the May, 1946, Grand Jury?

(The Witness) I have no independent recollection.

(The Court) Are there any other questions, Mr. Boyd?

(Mr. Boyd) No.

(The Court) Mr. Murrell?

(Mr. Murrell) No.

(The Court) Thank you very much, Judge Sayler.

(The Witness) Is that all?

(Mr. Murrell) Thank you very much.

(Testimony of witness concluded.)

(Mr. Boyd) I re-offer the testimony of Judge O'Dunne, Judge Dennis, Judge Frank and Judge Bond.

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(Mr. Murrell) I make the same objection.

(The Court) The same ruling, denied.

(Mr. Murrell) I assume that Mr. Boyd has finished calling witnesses.

(The Court) Do you have any other testimony, Mr. Boyd?

(Mr. Boyd) I want to get some figures into the record.

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(Tr. pp. 143-146):

(Mr. Boyd) I would like to get into the record either by asking the Clerk to appear or suggesting to the Court the figures which I obtained from the Board of Election Supervisors, that in Baltimore City, being unable to break the figures down as between male and female, but as between white and colored voters, there are two hundred ninety-four thousand two hundred sixty nine white registered voters, and that there are forty-nine thousand three hundred and eighty two colored.

(The Court) Give me them again.

(Mr. Boyd) Two hundred ninety-four thousand, two hundred sixty nine male and female white voters.

(The Court) Of what year are you speaking?

(Mr. Boyd) The close of 1946. And that there are forty-nine thousand, three hundred and eighty two colored voters, male and female.

(The Court) Is there any breakdown between male and female?

(Mr. Boyd) They told me that you would get it only by running the totals down in the precincts. I am willing, without taking the time to do it now, to have that incorporated by reference available to either party. I think also that earlier in the proceedings I talked to Mr. Murrell and told him the latest census figures I could get

were estimates of the Health Department of Baltimore City. They showed the total population nine hundred thirty-five thousand population in the City, of which 19.3, or four percent—

(The Court) 19.3 or 19.4?

(Mr. Boyd) 19.3 or 19.4 were of the colored race.

(The Court) Did you get it from Dr. Fales?

(Mr. Boyd) Over the telephone, yes, sir. That estimate was as of June, 1946.

(The Court) Isn't it a fact that there has been some influx into Baltimore City of white and colored as a result of the war industries?

(Mr. Boyd) That is true.

(The Court) They cannot, of course, waive the one year declaration of intentions act.

(Mr. Boyd) Yes, sir, bearing that in mind I found out which was the latest official census. I found it was 1940. The proportion in 1940 was either 19.3 or 19.4. They alternate. I don't remember which is which, but it is within one tenth of one percent, age point? I think that ought to be available for use in the record if either side sees fit.

(The Court) I will allow either side to incorporate into the record any official figures, but I do not know of any figure that Dr. Fales has published that would substantiate the figure of nine hundred and thirty-five thousand for Baltimore City. We have made some studies for other purposes, or I have. I am afraid that figure may be misleading. In any event, you find it is 19.4 in 1940. It is 19.3 today.

(Mr. Boyd) Yes, sir.

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(Tr. pp. 146-147):

DIRECT EXAMINATION OF

JUDGE EMORY H. NILES.

By Mr. Murrell:

(The Court) For the record, your name, date of admission to the Supreme Bench?

(The Witness) Emory H. Niles, associate Judge of the Supreme Bench, elected in 1938.

Q. You were a member of the Supreme Bench in May, 1946? A. I was.

Q. You were an associate Judge in connection with the selection of the May, 1946, Grand Jury, is that right? A. I was.

* * * * * *

(Tr. p. 150):

(The Court) What is the practice of the Supreme Bench in May, 1946, and since with respect to excusing persons from service on the Grand Jury if they find it too burdensome?

(The Witness) My knowledge is based upon my own experience in the Criminal Court prior to the May term, 1946, but I believe the practice is exactly the same, that the person selected himself requests that he be excused for various personal reasons.

* * * * * *

(Tr. pp. 152-153):

(The Court) To what extent have you personally made nominations of members of the negro race for service on the Grand Jury since 1946?

(The Witness) I looked up my records and unfortunately I destroyed a file I had been keeping for a long time about six months ago in order to get rid of what I thought was an unnecessary accumulation of papers. In

1946 I have been able to locate nominations I have made. I find that in April——

(Mr. Boyd) Objected to.

(The Court) The April nominations are for which term of the Grand Jury?

(The Witness) The May term.

(The Court) Overruled, proceed.

(The Witness) I find I nominated Mr. Berry in April. He is a member of the negro race. In June, I made three other nominations. There were no members of the negro race in the June nominations. In December——

(Mr. Boyd) Objected to.

(The Court) This is 1946?

(The Witness) 1946.

(The Court) For the present term Grand Jury?

(The Witness) Yes.

(The Court) Overruled.

(The Witness) I made three nominations. There were no members of the negro race.

(The Court) With reference to the selection of Jurors, for the purposes of the record, will you state what, if anything, you did and what action was taken by the Supreme Bench toward eliminating any designation on the Petit Jury list of persons of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled. And can you give approximately the date?

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(Tr. pp. 154-155):

(The Court) Do you know of any custom since 1946 by which one particular member of the Supreme Bench,

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who has been called in these proceedings the Republican member, makes the selection of the Grand Jurors who are members of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled.

(The Witness) I know that there is not such a rule or custom on the Bench because I personally both in 1946—am I allowed to speak of before 1946?

(The Court) Let's speak about 1946 for the minute.

(The Witness) In 1946 I have nominated two members of the colored race and would have nominated others if their names had been available to me and I had known them.

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(Tr. pp. 156-160):

CROSS EXAMINATION OF
JUDGE EMORY H. NILES.

By Mr. Boyd:

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Q. Had you personally made nominations for the negro race prior to 1946?

(Mr. Murrell) Objected to.

(The Court) Sustained. Do you care to make a proffer of proof?

(Mr. Boyd) No, that is the time I asked a question and didn't know the answer. That is a dangerous thing.

(The Court) Not if you are looking for facts rather than playing a game. With a man's life at stake, I am sure you are not playing a game.

(Mr. Boyd) True, but consistency is a jewel and it is Your Honor's ruling——

(The Court) I am trying to be consistent.

Q. Has there been any material change in the method of selecting Grand Juries as between 1946 and prior to that time while you were on the Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained. I don't know what you mean by a material change. If you are talking about the way in which the Bench sits down and goes over the list, that is one thing. If you are talking about colored names and names that are submitted and whether there has been any change in the number of negro nominations, I certainly will permit you to ask Judge Niles that question. Do you want to ask whether there has been any change with respect to number that he has had personal knowledge of——

Q. Do you know what the practice of the Supreme Bench was in 1938, when you first came on the Bench, with respect to the selection of Grand Juries particularly with reference to the colored members thereof?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I don't know how I am going to show a change if I am not entitled to show what existed before.

(Mr. Murrell) Maybe there hasn't been any.

Q. Has there been any change or not in the manner of the selection of the Grand Jury particularly with respect to the participation of the colored race thereon since you became a member of the Supreme Bench? I mean a deliberate, acknowledged, and accepted change of policy?

(Mr. Murrell) Objected to.

(The Court) Sustained.

Q. Has there been any change in the practice of selecting Grand Juries particularly with respect to col-

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ored members thereon since you became a member of the Supreme Bench?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) I thought that was the question you suggested.

(Mr. Murrell) The suggestion was the number.

(The Court) The May, 1946, Grand Jury, if no one had declined, would have had two members of the negro race on it?

(The Witness) Yes. They were—the original list of twenty-three contained two negroes.

(The Court) You don't have any independent recollection of whether the other two Grand Juries in 1946 may have had more than two or less than two negroes, do you?

(The Witness) I have no recollection.

(The Court) As a matter of fact, did you have any recollection of how many were on this Grand Jury until you looked at the names?

(The Witness) No.

(The Court) Is there anything else, Mr. Boyd?

Q. Do you know how many members of the Grand Jury previous to 1946 came from the colored race?

(Mr. Murrell) Objected to.

(The Court) Sustained.

(Mr. Boyd) It is already in evidence.

(The Court) Judge Niles just got through telling you he has no independent recollection of how many there were.

(Mr. Boyd) I am talking about before 1946.

(The Court) Sustained.

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(Tr. p. 163):

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(Mr. Boyd) • • • I really think it is incumbent on the Bench under the facts as they have developed in this case—I think the burden has shifted. I think if the record is to be clear I think there should be a voluntary statement by the several other members of the Supreme Bench as to what the practice is or is not. • • •

• • • • • •

(Tr. pp. 167-175):

TESTIMONY OF
CHIEF JUDGE W. CONWELL SMITH.

(The Witness) May I stand, Judge?

(The Court) Yes. I understand that Judge Smith has gone over the record in this case and desires to testify further. Is that right, Judge Smith?

(The Witness) I have gone over it and I have also made an inquiry. As a result thereof, I would like to read a statement into the record.

(The Court) You may proceed, Judge Smith.

(Mr. Boyd) May we know what record has been gone over?

(The Court) The transcript in the case. I have had that written up for myself preparatory to writing an opinion in the case assuming the case had been disposed of.

(Mr. Boyd) I didn't know it was written up.

(The Court) There was such an apparent error as to one matter of fact that I showed the record to Judge Smith. You may proceed.

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(The Witness) Your Honor, when I originally appeared to testify in this case, on January 29th, 1947, I came without any particular preparation in the mistaken belief that I should be able to answer any question asked me by relying upon my memory alone. I found a number of questions that I could not answer fully, because I had no memory of the details. I have since had an opportunity to make an inquiry into the relevant facts, as a result of which I am now able to state facts, which are accurate, having been checked and double checked, in addition to the general statement previously made, which I believe to have an important bearing upon the question raised before you in this case. This is my reason for asking leave to appear here a second time.

I first want to ask leave to correct an error in my original statement. I spoke (more than once) of the list of 750 names furnished by the jury clerk prior to the beginning of the term as having been "drawn from the wheel". These names are not drawn from the wheel, but are drawn from the jury service file.

While it is true, as I have already stated, that the method of selecting the Grand Jury has been the same ever since I have been a member of the Bench, yet it is also true that the use made by Judges of the method has changed and a somewhat different result produced. The belief expressed by all of the counsel in the Jackson case that the Judges of the Supreme Bench were not animated by conscious prejudice against negroes in the selection of juries, may, I believe, as to the members of the present Bench, be demonstrated as a fact from the records.

I am able to speak with greater assurance in regard to the selection of the Grand Juries of the period since I became the Chief Judge on September 1st, 1944. Since that time, all of the suggestions of the various Judges for the make up of the Grand Juries have been channeled through me, and the records of these suggestions are still available to me.

Since my appointment in 1944, the Judges have
more frequently, and have thus had a greater oppo
nity for discussion and the free interchange of opin
In addition to the monthly meetings on the first Sa
day for the hearing of motions for new trial in crim
cases, the Judges meet on Thursday of each week du
the luncheon recess in the Supreme Bench confer
room. During these meetings the selection and comp
tion of the Grand Juries and petit juries and the par
pation of negroes in jury service have been discus
Early in 1945 the Bench ordered the removal of
distinguishing marks after the names of negro mem
of the Grand and petit juries.

During that period, seven Grand Juries (begin
with the January Term, 1945) have been selected
the nominations of the Judges to augment the ger
list, the highest number of negroes was six and the
est number two, out of a total which varied from 4
54. Out of the seven Grand Juries, only one colored
was selected and certified to serve, and did serve
each of four Grand Juries; while on each of three G
Juries two colored members were selected and cert
to serve.

On the January Term, 1945 Grand Jury the follo
negroes served:

Edward Richard Blake, 907 North Carey Street.

W. Emmett Coleman, 2026 Madison Avenue.

On the September Term, 1945 Grand Jury, the
lowing negroes served:

Edward N. Wilson, 754 Dolphin Street.

Robert James Young, 501 Sanford Place.

On the May Term, 1946 Grand Jury the follo
negroes were selected and certified as members:

Willard W. Allen, 1223 West Lafayette Avenue.

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John L. Berry, 2038 Druid Hill Avenue.

Both of these members of the Grand Jury were unable to serve and asked to be excused from serving. As I have previously stated, it has not been the practice to compel persons to serve on the Grand Jury against their will. Both were excused from serving, and among the persons selected to fill the places of persons unable to serve was a third negro, T. Wallace Lansay, Sr., 1634 Druid Hill Avenue, who accepted, and served.

On seven Grand Juries, therefore, eleven negro members were selected to serve, of which two asked to be excused from serving, and were excused, while nine agreed to serve, and did serve. Since 1944, the Judges of the Supreme Bench have done the following things in regard to jury selection and service:

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended the increase of the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of Judges to study the jury system, and make recommendations looking to:

a. Broadening the representative character of the basic jury list, and

b. Improvement in the method of selecting persons for jury service.

The general scheme for the selection of Grand and Petit Juries in Baltimore was provided by the Acts of 1898, Chapter 123. The pay of jurors is provided by the acts of 1927, Chapter 65. Improvement in jury selections may require changes in the laws regulating jury ser-

vice, or changes merely in the method of administering them. The participation of negroes in jury service is but one phase of the problem. I cannot say that this particular phase of the problem has received special attention from the Bench, but I can say that the whole problem, and its many phases, has been given consideration.

(The Court) Are there any questions you wish to ask Judge Smith, Mr. Murrell?

(Mr. Murrell) No, sir.

(The Court) Mr. Boyd?

By Mr. Boyd:

Q. I believe you appeared originally on the 29th of January, if that is the right date? A. That is what the record shows.

Q. In answer to a written request from me, did you not? A. That is right.

Q. And my request stated that I believed it would be appropriate and necessary to have in the record statements by you and at least one other member of the Supreme Bench, probably Judge Sayler, concerning the mode of selecting the Grand Juries for Baltimore City? A. That is right.

Q. And it referred to the motion in the case of the State versus Zimmerman? A. That is right, Mr. Boyd. And I thought I should be able to answer your questions without making any particular inquiry. The facts which I have related here have been developed as the result of a rather extended inquiry which took a considerable period of time and a great deal of effort.

Q. The only purpose of my question was to have in the record—I am sure you did not mean it—you may have left the impression that I had not attempted to advise you of the nature of the case? A. No, I knew the

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purpose for which I was to be here but I thought I knew the subject better than it turned out I did.

(The Court) Is there anything else further from Judge Smith?

(Mr. Boyd) No, sir. While he is here, I think duty requires me to make a motion that all matters of opinion contained in the statement, which I did not see fit to interrupt as a matter of courtesy, be stricken from the record.

(The Court) The motion is overruled. Is there anything else?

(Mr. Boyd) No, sir.

(The Witness) May I be excused?

(The Court) Certainly.

(Testimony of the witness concluded.)

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APPENDIX TO APPELLEE'S BRIEF NO. 177

(Tr. p. 21):

(The Court) I am afraid that the use of the word "prepared" may leave a meaning that is not quite right. A list may be prepared but it is the way in which it is selected that, I think, you want to ask him about now.

(Mr. Boyd) I gladly accept that suggestion for I am in a position of asking about something that you know about and I don't. Any time you have a suggestion like that, I would welcome it.

* * * * * *

(Tr. p. 23):

DIRECT EXAMINATION

EDWARD R. FOLGER

Q. Who was the Jury Judge in 1946? A. In 1946 it was Judge Smith.

(Tr. pp. 31-32):

(The Court) Grand Jury nominations, May term, 1946. Then follows two pages. And then a long series of pages. I shall not stop to count them.

(Mr. Boyd) The long series do not refer to the Grand Jury?

(The Court) Yes, they do. That is why I am afraid—I want to be sure you get all the facts.

(Mr. Boyd) I understand. I am sure you will.

(The Court) Then appears this, "The undersigned Judges of the Supreme Bench of Baltimore City hereby certify that they have selected the aforegoing four hundred and forty-three names of persons qualified under the laws of the State of Maryland to be Grand and Petit Jurors for Baltimore City, in accordance with the Act of the General Assembly of Maryland 1898, Chapter

123, Section 602, and Amendment thereto. Witness our hands and seals this 16th day of May, 1946. The signatures are Judge Smith, Judge Dickerson, Judge Niles, Judge Tucker, Judge Moser, Judge Sayler, Judge Mason, Judge Manley. Mr. Folger, I noticed that on the one I just read four hundred and fifty-three names are given. On June 25th, 1946, it says seven hundred and fifty names. Is that what you have? Mr. Boyd, for the record, I turned over too many pages.

(Mr. Boyd) Don't you want to strike that out?

(The Court) All right. An order of the Supreme Bench, dated April 29th, 1946, signed by Judge Smith, Judge Sayler, Judge Niles, Judge Tucker, Judge Sherbow, Judge Mason, Judge Moser, "The undersigned Judges of the Supreme Bench of Baltimore City hereby certify that they have selected the aforegoing seven hundred and fifty names of persons qualified under the laws of the State of Maryland to be Grand and Petit Jurors of Baltimore City, in accordance with the Act of the General Assembly of Maryland, 1898, Chapter 123, Section 602, and the Amendments thereto, witness our hands this 29th day of April, 1946." Mr. Boyd, all these papers are available to you.

* * * * * *

(Tr. pp. 36-38):

Q. I asked you to bring with you records in connection with the number of the members of the negro race who have been members of the Grand Jury in Baltimore for the May term, 1946, and for other years. Have you got those records? A. You said 1946, May Grand Jury. There were six colored people submitted.

Q. There were six colored persons named on the Grand Jury list? A. Yes.

Q. How can you tell that? A. There is a copy of it that I make up from the original list. One, Willard Allen, John L. Berry, he had served on a Grand Jury

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before. Mr. Allen had served on a Grand Jury before. J. Alvin Jones, another colored man. He was in our service files. He claimed exemption on account of being a specialist for the United States government. T. W. Lansey, fifty-two, he has been on the Grand Jury before.

Q. How about Mr. Leidig? A. He is white.

Q. How do you tell they are colored? A. They are indicated on the list handed to me.

Q. When you get the list it is indicated on there? A. Yes.

(The Court) Let him finish the list of names.

(The Witness) Then there was another man, William Nelson, he served on the Grand Jury before. Sixty-four, colored. Then there is another one, Templeton. He was submitted. He never has served, being connected with the housing authorities.

Q. Following back about the fifth page, there is something called corrected list of nominations for the Grand Jury. A. When that list is submitted, that is the notations we make after our investigations. I have to give them information, telling them how many served, what are their occupations or business.

Q. You receive the original paper sent you by Judge Smith and then you re-copy that after your investigation. A. Yes.

Q. And as part of your investigation you indicate they are members of the colored race by the letter "C"? A. Yes.

Q. How many members of the Grand Jury, May term, 1946, were of the colored race? A. There were six submitted.

Q. How many were actually on the Grand Jury? A. One.

* * * * * *

(Tr. p. 42):

(The Court) The names that are negro that reach five, six, seven or eight names on your added list, do they always come from one Judge?

(The Witness) No, sir.

(The Court) They come from different Judges?

(The Witness) Yes, sir.

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(Tr. p. 45):

(Mr. Boyd) I know you want this to be complete. If I have omitted anything you think I should have put into the record for the benefit of my client, I humbly ask you to bring it to my attention.

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(Tr. pp. 63-64):

CHIEF JUDGE W. CONWELL SMITH

DIRECT EXAMINATION

(The Court) Isn't it a fact that after a Grand Jury has been unable to organize after the beginning of the term, and substitutes are sought, that the Judges will call persons whose names have been suggested to find out if they are or are not available so the Grand Jury may organize the next day?

(The Witness) Yes, when a substitute is suggested we ascertain right then and there whether he is willing to serve and is able to serve.

(The Court) Judge Smith, do you know whether in those instances persons of the negro race have been telephoned to to find out if they were available to serve the next day?

(The Witness) Yes, I recall instances where such efforts have been made.

(The Court) Were they successful or not?

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(The Witness) The ones I recall were unsuccessful.

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(Tr. pp. 67-68):

Q. In considering the list of prospective Jurors for the selection of the Grand Jury, do you have any particular mode or procedure. Do you start at any particular place in the Bench room or with any particular person? A. No, the suggestions for the selections are made by all the Judges and are passed upon by all the Judges with the result, as I stated before, that this selection of the Grand Jury is the result of the unanimous action of all of the Judges at a meeting.

Q. Does it ever occur that a Judge would be asked in any particular order what is their preference out of the names suggested by him? A. Of course, it is a free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury.

Q. I can understand that, but I am not sure that that answers my question. My question was do members of the Supreme Bench remembering or having their own records as to recommendations made by them ever press or are they called upon to press or given an opportunity to press what might be their first, second, or third choices for nominations to the Grand Jury? A. Yes, they can say anything they like about them or about any suggested by any other Judge.

Q. Is that done in any regular rote? A. No.

Q. You don't start with any particular member of the Bench or go around the table? A. Yes, we might start with the member who is to the left of the Chief Judge, but who happens to be there is a matter of chance. There are no regular positions at the table.

Q. You don't have place cards? A. No, nor any order according to seniority or otherwise and no Judge now so far as I recall who claims any particular chair.

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(Tr. p. 73):

CHIEF JUDGE W. CONWELL SMITH

CROSS EXAMINATION

Q. Judge Smith, just one question, as the Jury Judge do you make any special effort to obtain the services of qualified negro jurors? A. No more than I did to obtain the services of qualified white Jurors.

Q. The exact amount of effort, is that right, in the selection of both? A. That is right. I interviewed quite a number of prospective Jurors on successive days in May last year in the Criminal Court which were especially set aside for that purpose and in every case by personal interview with the man who was summonsed I tried to determine his qualifications as a Juror.

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(Tr. p. 76):

EDWARD R. FOLGER

CROSS EXAMINATION

Q. Where were these names secured, from what were they secured, the present list? A. The present list of names are taken from wards on the registration books, different precincts, and we take them from the criss-cross telephone book, from the automobile book, and the City Directories which have a pink section in the back giving the names of property owners.

Q. When you make up the cards from the list, your index cards, do you have any designation when you make the card up, as to whether that person is a member of the negro race?

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(Tr. pp. 77-78):

Q. Out of the sixteen or eighteen thousand you compile this list of seven hundred and fifty? A. We keep replenishing that list twice a year. So many people

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are overage, some of them have died, some of them have left the City, we have a lot that we had to take out because they were in the Navy, in the Army. A lot of them were excused for the duration.

Q. After you have compiled this list of seven hundred and fifty names, you have made a complete investigation of the individuals? A. Of Petit Jurors?

Q. Yes. A. No, we send him a pink slip through the mails. He comes before the Jury Judge just as I have in here (indicating). He is examined.

Q. Did you send out seven hundred and fifty? A. No, we send about eighteen hundred or two thousand names.

Q. After they are examined by the Jury Judge as to their qualifications, what do you get back from the Jury Judge? A. He does that right in front of us. We call four hundred a day. We use a whole week, four hundred a day.

Q. After you have completed your list at the time of the examination by the Jury Judge, what do you do with that? A. We make out a special card for him, we post his name, occupation, residence, how long he has lived in the State of Maryland, have you ever filled out a questionnaire. He says no. What months do you prefer for service. No service. You mark on there no preference.

* * * * * *

(Tr. pp. 82-85):

EDWARD R. FOLGER

RE-DIRECT EXAMINATION

(Mr. Boyd) Mr. Folger keeps records and I understood him to testify that the Grand Jury is selected from the list of nominations supplied by the Chief Judge and not from any other list.

(The Court) If you have that impression I should clear it up now. Mr. Folger, do you send into the Supreme Bench the list of the seven hundred and fifty names, plus the other names?

(The Witness) Yes, sir.

(The Court) Are you present in the Supreme Bench room or do you know what takes place in the Supreme Bench room?

(The Witness) No, sir.

(The Court) When do you next hear what the Supreme Bench has done with respect to the Grand Jury?

(The Witness) The nominations we have. The Chief Judge makes the original of the nominations——

(The Court) No, after the Supreme Bench picks out twenty-three people, are you told who they are?

(The Witness) Yes, by a sheet made up by the Clerk of the Supreme Bench, Mr. Mooney.

(The Court) After you have submitted the full list of seven hundred and fifty names plus the added names to the Supreme Bench, your next contact with it is a list of twenty-three names which you get from Mr. Mooney?

(The Witness) That is right.

(The Court) Do you check that list of names against anything?

(The Witness) No.

(The Court) What do you do with it?

(The Witness) Put it in our book for convenience.

(The Court) Is that a part of your records?

(The Witness) Yes.

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(The Court) Do you in any way know how those twenty-three names were selected?

(The Witness) No.

(The Court) Your next step is from Mr. Mooney when he hands you a paper with twenty-three names on it?

(The Witness) That is right.

(The Court) All you do is file it?

(The Witness) Yes, sir.

(The Court) You don't summons the Grand Jury?

(The Witness) No.

(The Court) Do you take it to the Clerk of the Criminal Court?

(The Witness) No.

(The Court) Do you give it to the Sheriff?

(The Witness) No.

(The Court) All that machinery is done by the Supreme Bench too?

(The Witness) Yes, sir.

(The Court) You are just the custodian of these records?

(The Witness) Yes, sir.

(The Court) Mr. Boyd, I am afraid you got the wrong impression.

* * * * * *

(Tr. pp. 97-99):

(Mr. Boyd) Mr. Mooney. I will want to have the official records of the May term, Grand Jury, in comparison with the nominating list of the May term Grand Jury. Possibly those of other Grand Juries. If Mr. Folger, I will ask you to guide me, is not the one who

could testify conclusively to the number of colored Grand Jurors, then I would like to have an offer of the information by which I could produce the correct information.

(The Court) I do not know how you are going to be helped. So far as this individual Judge is concerned, I have not been concerned with it. From my advent on the Bench, the letter "C" was stricken out of the Petit Juror lists and has never appeared since that time, not as a result of my sole action, but because every member on the Bench at or about that time felt that such a designation ought not go unchallenged. I have never been in Mr. Folger's office in my life except to say hello. I don't know where his cards are kept.

(Mr. Boyd) That is right, but that might lead one to believe that there is nowhere any designation through this process for the selection of colored persons or not. That is not the fact.

(The Court) After twenty-five years of trial experience and a couple of years on the Bench—in the last two or three years, no trial lawyer knows out of the Petit Jury list who is white or colored unless he makes it his business to inquire of the color of some certain person. There is nothing on the printed list to show it.

(Mr. Boyd) We were talking about the Grand Jury.

(The Court) It does not appear on any list that you get and I do not know that Mr. Folger would disclose it to anybody. When the list of the twenty-three names on the Grand Jury is published, there is no letter "C" or the words colored or white published on any list. You are dealing with the problem that precedes the final publication of the list.

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(Tr. pp. 106-107):

LAWRENCE R. MOONEY

DIRECT EXAMINATION

(The Court) Tell us who signed the Jury book list for the May term, 1946, if you have it there?

(The Witness) For what term?

(The Court) The May term, 1946. Mr. Boyd, I assume this is the information you want.

(Mr. Boyd) Part of it.

(The Witness) That Judges that signed were W. Conwell Smith, J. Abner Sayler, Emory H. Niles, John T. Tucker, Joseph Sherbow, E. Paul Mason, and Henry M. Moser.

(The Court) Now, Mr. Boyd, I asked you whether or not you wish me to disqualify myself, having signed the very list that is involved in this case.

(Mr. Boyd) The question having occurred to you, I think the answer could just as well. I haven't any desire to disqualify you. I am not afraid of any decision I shall get.

(The Court) I am being very particular as we take this case step by step to safeguard every right this traverser has. The man I have never seen and do not know his name, except by looking at the Indictment. Are you making any motion for the disqualification of the Court in this case?

(Mr. Boyd) I am not. The Court knows the facts better than I do. Disqualification is an action that must take place only by the Court per se. If you think you are disqualified, you have the belief for that far better than I do.

(The Court) It is not that at all. Do you have any motion to make on the subject of my disqualification?

I don't mind saying very personally that I do not feel in the slightest disqualified by reason of the fact that I signed the Jury list, but if you do, I want to know it at this stage.

(Mr. Boyd) I don't believe that fact is indicative one way or another. The fact that you did is not a controlling factor.

• • • • • •

(Tr. pp. 122-123):

(The Court) Right at that point the expression fifty name list has been used, will you tell us some of the other totals, other than fifty that have been on the list?

(Mr. Boyd) It came in before, it came in by Judge Smith, but I am willing to have it.

(The Court) Yes, but I am just checking from records I have here. I would like Mr. Mooney to tell how many were on the list at different times.

(The Witness) I haven't counted all the lists, but I would say it varies from forty-two to sixty-two.

(The Court) As low as forty-two?

(The Witness) Possibly on one or two occasions.

(The Court) And as high as sixty-two?

(The Witness) Yes, sir.

(The Court) When the expression fifty is used, can you say other than that term that it was exactly fifty? A. I cannot.

(The Court) I want that in because the fact that it is an even number may give a misinterpretation. There is no fixed number. It may run anywhere from forty-two to sixty.

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(Tr. pp. 125-127):

EDWARD R. FOLGER

RE-CROSS EXAMINATION

Q. Mr. Folger, you testified originally in direct examination by Mr. Boyd that you received the Judges' nominations list, so called, of fifty names more or less, and then you made individual investigations of those individuals named on that list. I want to ask you in reference now to the May, 1946 Grand Jury list of nominations. When you received the Judges' nominations list, which in May consisted of fifty names, did you make an investigation of each of those individuals? A. Only to the ones we have in our files.

Q. Did you take that entire list of fifty names and compare those names with your regular service file list? A. Yes.

Q. You testified before that your service file consisted of about sixteen thousand names, is that right? A. Yes.

Q. I ask you with particular reference to the May, 1946, Grand Jury nominations, you made an investigation and checked those names, those fifty names with your service file? A. Yes.

Q. Did you prepare a copy to go back to the Supreme Bench with a list of the qualifications of the individuals? A. Eleven copies.

Q. Is that (indicating) a copy of the list you sent back with the qualifications of the individuals on that list? A. Yes.

Q. Tell us how many of those names on the original list of fifty that you received from the Supreme Bench were in your service files already? A. I should say about one, one that was not in our files.

Q. So you had forty-nine in your files? A. Yes.

Q. Would you turn to the list of twenty-three, the Grand Jury as so certified, and tell us how many of those names in the May Grand Jury list were already in your service files? A. All of these were.

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(Tr. pp. 149-150):

JUDGE EMORY H. NILES

DIRECT EXAMINATION

(The Court) They are already in. Will you look at the first Exhibit if you please? Do you have that?

(The Witness) No.

(Mr. Murrell) I beg your pardon. This is Defendant's Exhibit D (indicating).

(The Court) Who is number one on that list?

(The Witness) Willard W. Allen.

(The Court) Do you know whether he is a member of the negro race?

(The Witness) I know he is.

(The Court) Who is number three?

(The Witness) John L. Berry.

(The Court) Is he a member of the negro race?

(The Witness) He is.

(The Court) So the original selection of the May, 1946, Grand Jury as signed and certified by the Supreme Bench of Baltimore shows two members of the negro race selected for the May, 1946, Grand Jury, is that right? A. That is right.

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(Tr. pp. 150-152):

(The Court) Then upon excusing Willard W. Allen and John L. Berry, both members of the negro race, it

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became necessary to have what kind of a meeting of the Supreme Bench?

(The Witness) A special meeting.

(The Court) Was that meeting called?

(The Witness) It must have been because here (indicating) is the order signed by most of the Judges.

Q. At that meeting, were substitutions for Mr. Allen and Mr. Berry made? A. They were.

(The Court) I think the name Triplett was some kind of an error in the first name. Leaving Mr. Triplett out, who was substituted for Mr. Allen and Mr. Berry?

(The Witness) The substitutions are not made specifically one person for another. There were three substitutions made for three persons excused.

(The Court) Those three substitutions were?

(The Witness) Ferdinand Meyer, T. Wallace Lansey and Clayton N. Triplett.

(The Court) Mr. Lansey is colored, is that right?

(The Witness) I don't know. I am told he is but I don't know it.

(The Court) You don't know him yourself?

(The Witness) No.

(The Court) Out of the twenty-three names and the three substitutions making twenty-six, if we count Mr. Triplett as two persons, there were three members of the negro race actually selected by the Supreme Bench of Baltimore City?

(The Witness) That is right.

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(Tr. pp. 153-154):

(The Court) With reference to the selection of Jurors, for the purposes of the record, will you state what, if anything, you did and what action was taken by the Supreme Bench toward eliminating any designation on the Petit Jury list of persons of the negro race?

(Mr. Boyd) Objected to.

(The Court) Overruled. And can you give approximately the date?

(The Witness) I can't give you the date except my recollection is that it was about two years ago. It seemed to me it was improper to have the designation "C" for colored on the Petit Jury lists. I expressed that opinion. I found that that was agreed with by several other judges. Instructions were given informally to have the "C" eliminated. All Jury lists now show the lists of the names without any designation with respect to color.

(The Court) Was that action taken unanimously by the Supreme Bench?

(The Witness) I can't recall. It was the opinion of the Judges of the Bench that that ought to be done, but the formal mechanics of it I don't remember.

(The Court) The letter "C" which had appeared on the printed Jury lists for Petit Jurors after 1945 or thereabouts no longer appeared?

(The Witness) That is right.

(The Court) Do you know of any designation on the Grand Jury Lists that are made public that denote whether a person named is of the negro race or not?

(The Witness) I haven't examined the published lists but my impression is there is no designation to indicate color.

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IN THE COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1947, No. 177

SAM ZIMMERMAN, Appellant,

v.

STATE OF MARYLAND, Appellee

Appeal from the Criminal Court of Baltimore City

OPINION BY HENDERSON, J., filed June 16, 1948

The appellant, a negro, was tried and convicted of murder in the first degree, in the Criminal Court of Baltimore City, and sentenced to life imprisonment. Through his counsel, appointed by the court, he filed a motion to quash the indictment on the grounds that the Grand Jury which returned the indictment was not selected in accordance with the laws of Maryland, and that the method of selection violated the appellant's rights under the Federal Constitution. The appeal challenges the correctness of the court's ruling in refusing this motion, and also the rulings of the court in excluding evidence offered in support of the motion.

The Charter and Public Local Laws of Baltimore City (1938 ed.), prescribe the method of selecting grand and petit jurors. §687 provides: "The Judges of the Supreme Bench of Baltimore City, or a majority of them, shall * * * select fairly and impartially, and by the exercise of their best judgment, the names of seven hundred and fifty persons, or thereabouts, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore. * * *." §689 provides: "The said list of persons, qualified under the laws of this State to be grand and petit jurors in the City of Baltimore, having been prepared as aforesaid, it shall be the duty of the said Judges of the Supreme Bench of Baltimore City, or a majority of them, * * * to select from said list the names of twenty-three persons, who shall constitute and be the grand jurors for the City

of Baltimore for the ensuing term of said Criminal Court of Baltimore; * * *". §694 provides: "The said Judges of the Supreme Bench * * * shall * * * after the selection of the grand juries for the City of Baltimore, as provided in Section 689, cause all the names selected by the Judges as aforesaid, remaining upon said list of qualified jurors, to be inscribed upon ballots, which * * * shall be placed by one of such Judges, with his own hands, on the day of said meeting and immediately before the drawing herein provided for, in a drawing wheel provided for that purpose by the Sheriff of Baltimore City, under the direction of said Judges; * * *." From four to five hundred names are thus drawn by lot to serve upon the petit juries.

It may be noted that the Judges are directed to "select" the Grand Jury. This provision was adopted by ch. 67 of the Acts of 1882. Prior to that time, the names were drawn from a wheel, the first twenty-three constituting the grand jury, a practice which prevails in most of the counties. Compare Code, Art. 51 §10. We may assume that the change was designed to improve the quality of the grand juries and obtain the services of competent and impartial persons to exercise the important dual functions of passing upon all serious charges of crime and investigating the operation of the penal, law enforcement and other public institutions and agencies of a large urban community. After selection, the Grand Jury serves for a period of four months, whereas the petit juries serve for only three weeks.

As shown by the testimony, the practice has departed somewhat from the procedure outlined in the Statute. For many years a special jury clerk has been employed to prepare and keep up to date a jury service file containing the names of some 18,000 eligible residents, who are carefully selected from tax lists, voting lists, the telephone book, the automobile book, and the City Directory. Persons so selected are summoned to appear before one of the Judges of the Supreme Bench, designated as Jury Judge, for examination as to their qualifications. (Rule 1 of the Supreme Bench). Upon approval, their names, with all pertinent information, are put in a card index system.

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Prior to the commencement of each term of the criminal court, the jury clerk selects from the file and presents to the Supreme Bench a list of seven hundred and fifty names.

Each of the eleven Judges of the Supreme Bench also submits to the Chief Judge, prior to the commencement of each term, nominations of persons known to him to be qualified, which may vary in number from two to fifteen. This composite list, which varies from 42 to 62 names, is turned over to the jury clerk, who checks their age, occupation, residence, race, prior jury service and other like information. This list of nominations is then returned to the Chief Judge. Selections for the grand jury are made from this list, or from the list of 750 names above mentioned, by unanimous action of the Judges. In case any of the twenty-three persons selected requests to be excused from serving, the request is customarily granted, and another meeting is called to fill the vacancy.

The appellant was indicted by the Grand Jury for the May Term, 1946. As originally selected, it contained the names of two negroes, both of whom requested to be excused from serving. At a special meeting, a white man and a negro were selected to fill the vacancies. All of the twenty-three persons who served had previously been listed in the jury service file. After selection, the names published contained no designation as to race, nor did the list of petit jurors drawn from the wheel. There was, however, a designation of race upon the original lists.

The appellant contends that the record shows that the statute was not complied with, because selection is customarily made from the list of nominations, rather than from the list of 750 names prescribed by the Statute. In every instance since 1940, it was shown that the names ultimately selected for Grand Jury service appeared on the list of nominations, although in a few instances the names also appeared on the list of 750. We think the objection is without merit.

§709 of the Charter provides that "all the provisions * * * relating to the mode of drawing and summoning

jurors shall be construed as directory merely, and no indictment * * * shall be quashed * * * because of any failure by the Judges, or the Clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; * * *." Even in the absence of such a provision, this court has held that statutory provisions relating to the selection of a grand or petit jury are directory. *King v. State*, ... Md. .....; No. 130 October Term, 1947, and cases there cited. The statute imposes a duty of personal selection upon the Judges, and if, in the performance of that duty, an investigation and preparation is made in advance of the meeting and consideration of the larger list, we think there is substantial compliance with the statutory object. The statute, adopted prior to the time when the Supreme Bench established the jury service file under the supervision of the Jury Judge and Jury Clerk, contemplated personal selection by the Judges, or a majority of them, of each name upon the list of 750. Personal selection of the Grand Jury from a smaller list does not do violence to the statutory scheme, but makes that scheme more workable.

The appellant states in his brief that he does not "seek to have the indictment * * * quashed solely because of non-compliance with the charter provisions", but contends that non-compliance "has been one of the factors permitting * * * discrimination against negroes." We think, however, that in considering the question of discrimination, the answer cannot depend upon the mere size of the list from which the selection is made. The possibility of discrimination would seem to be present in either case.

The main point urged by the appellant is that the record shows an intentional and systematic limitation in the number of negroes serving upon Grand Juries in Baltimore City, and that this constitutes discrimination, in violation of the equal protection clause of the 14th amendment to the Federal Constitution. There can be no doubt that where the evidence shows a total exclusion of negroes, prejudice may be inferred. *Jackson v. State*, 180 Md. 658; *Lee v. State*,

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163 Md. 56; *Lee v. State*, 164 Md. 550, cert. den. 270 U.S. 639. In the first Lee case, the Court, speaking through Chief Judge Bond, said (p. 66) with reference to the selection of petit jurors by the Jury Judge in Baltimore County: "His system of drawing jurors begins with a collection of names of white eligibles, and hence is confined from the beginning to the selection of white men. Only the white men appear to have been looked to for jurors. The evidence, with the long, unbroken absence of negroes from the juries selected, seems to show an established practice, confining selections to white men as effectually as if such a restriction were prescribed by statute. And this court has concluded that this, under the authorities, amounts to unconstitutional exclusion of negroes." (Citing *Virginia v. Rives*, 100 U.S. 313, *Neal v. Delaware*, 103 U.S. 370, and *Carter v. Texas*, 177 U.S. 442.) In the second *Lee* case, where the names of six negroes were included in the panel of 200, it was held that no discrimination was shown.

The appellant contends, however, that under the recent decisions of the Supreme Court limitation in the number of negroes selected is as offensive as total exclusion. In *Akins v. Texas*, 325 U.S. 398; 89 L. Ed. 1692 (1945), the Supreme Court, speaking through Mr. Justice Reed, said: "This discrimination was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found. This is petitioner's only complaint as to racial discrimination." The Court pointed out that the petitioner was not entitled to proportional racial representation upon the jury, but only to require that it be selected without discrimination against his race. Although there was testimony from the three Jury Commissioners that they intended to select, and did select, only one negro upon that panel, the court was "unconvinced that the commissioners deliberately and intentionally limited the number of negros on the grand jury list." The court said: "This conclusion makes it unnecessary to decide whether a purpose-

ful limitation of juries by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment." In his dissenting opinion, Mr. Justice Murphy said: "Racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause." He also said: "If a jury is to be fairly chosen from a cross section of the community, it must be done without limiting the number of persons of a particular color, racial background or faith, all of which are irrelevant factors in setting qualifications for jurors. This may in a particular instance result in the selection of one, six, twelve or even no negroes on a jury panel."

Whatever the exact scope of the decision in the *Akins* case, we think the majority opinion recognized that selection, other than by lot, is not a valid objection. In dealing with the Texas statute providing for personal selection by jury commissioners, the Court said (325 U.S. p. 402): "This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith v. Texas*, 311 U.S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot." This view seems to be supported by the later decisions of *Fay v. New York*, 332 U.S. 261; 91 L. Ed. 2043, and *Moore v. New York*, ... U.S. .....; 92 L. Ed. 637. We find nothing in these decisions, except the intimations in the dissenting opinions, to indicate that chance, and chance alone, must determine the composition of a particular jury. And while the question whether a deliberate policy of proportional representation would vitiate a particular panel, was left open in the *Akins* case, we think the proof of such a policy is lacking in the case at bar.

Chief Judge Smith testified that since his appointment as chief judge in September, 1944, seven grand juries were selected, to and including the May Term 1946. During that period the nominations of the judges for each panel varied

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from 43 to 54, while the number of negroes nominated varied from two to six, the number nominated for the May term, 1946, being six out of fifty. During that period eleven negroes were selected to serve, and nine did serve. Edward J. Folger, Jury Clerk, testified that prior to 1944 he usually put the names of about 25 negroes on the list of 750, but since 1944, he had put from 40 to 60. The list for the May term, 1946, contained the names of 50 negroes. From 1910 to 1944, his records show that one negro served on every Grand Jury.

The Appellant called former Chief Judge Dennis, who served from 1928 until August 1944, as a witness, and offered to prove by him that during that period it was the established practice of the Supreme Bench to limit the negro members of the Grand Jury to one, "no more than one, and not less than one." He made the same proffer of testimony from three other retired Judges serving prior to 1944. This testimony was excluded, on the ground that there was no offer to show that the same practice continued after 1944.

For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted. Mr. Folger's testimony that one, and only one, negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two negroes who were excused from serving. The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946.

The appellant lays stress upon the conceded fact that negroes constitute about 19% of the total population of

the City. But that fact throws little light upon the proportion of eligibles. In *U.S. ex. rel. Jackson v. Brady*, 47 F.S. 362, 365 (1942), Judge Chesnut, sitting in the District Court, considered the question whether there had been a systematic exclusion of eligible negroes from the petit juries in Baltimore City. He said: "The evidence shows that while the proportion of the colored population to the white is about 20%, the percentage of negroes qualified, able and willing to serve as jurors is probably much less in proportion to the whole number of white persons qualified and available as possible jurors. Many negroes (probably the older ones) do not have sufficient educational qualifications; until recently a very large proportion in comparsion to the white population has been on relief; the percentage of conviction of crime of negroes is unfortunately higher than that of the whites; and many otherwise qualified negroes are exempt or excused from service on account of their occupation, either professional or industrial." He found as a fact that the jury service file, in 1941 and 1942, contained the names of 18,901 whites and 653 negroes, a proportion of 3.34%; that the list of 750 names contained the names of only 25 negroes, and that the panel of 50 from which the petit jury was selected contained the names of only two negroes. He found no evidence of discrimination in these facts. This ruling was affirmed on appeal (133 F (2) 476; cert. den. 319 U.S. 746). The same point was made in *Lee v. State*, 163 Md. 56, 65, where it was shown that the negro population of Baltimore County was about 10% of the total. The court said: "But it should be remembered that these numbers do not present an accurate statement of the proportion of eligible negroes, because of differences in the economic and other conditions of the races. There is a much larger proportion of the negroes than of the whites in the class of workers who could serve on juries only at the cost of a prohibitive sacrifice of earnings and employment."

In the case at bar there was no evidence of the proportion of negroes upon the jury service list, but there was evidence that the names of 50 negroes were placed on the

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list of 750, a proportion of 7½%. The appellant has not challenged the validity of that list. The proportion of negroes upon the list of nominations for the Grand Jury was 6 out of 50, or 12%. Out of 23 persons originally selected to serve, 2 were negroes. These facts tend to corroborate, not to impeach, the testimony of Chief Judge Smith and the other Judges who testified, that there was no discrimination against negroes.

In the absence of proof of a long continued and invariable practice, the fact that only one negro served on the particular jury is without significance. *Akins v. Texas*, supra. We think the appellant has failed to meet the burden of establishing a deliberate and intentional limitation on account of race or color, in the selection of the Grand Jury which indicted him, and that the finding of the trial court was supported by the weight of the evidence.

The appellant contends that the trial court erred in declining to sign an order permitting him to prosecute this appeal at the expense of the State. Code, Art. 5, §88A (as enacted by ch. 1068 of the Acts of 1945) authorizes an appeal *in forma pauperis* "in any case where a sentence of death is imposed." This section is clearly not applicable. We know of no other statute, or rule of court, which would authorize the passage of such an order. Even in a *habeas corpus* case, where the statute (code, Art. 42 §3c) permits the waiver of costs, we have denied an application for appeal *in forma pauperis*. *Olewiler v. Brady*, 185 Md. 341, 348. We find no error in the ruling of the trial court, even if such ruling were appealable.

Judgment affirmed, with costs.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 118, Misc.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Maryland

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—November 22, 1948

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 429. The case is placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the writ of certiorari.